

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 94 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME-TAX

Versus

JABAL INDUSTRIES

Appearance:

Mr.M.J. Thakore, Advocate, instructed by Mr.Manish R.
Bhatt, Advocate, for the Applicant.
Mr.D.A. Mehta, Advocate, as Amicus curiae.

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE R.BALIA.

Date of decision: 20/02/97

ORAL JUDGEMENT : (Per R. Balia, J.)

At the instance of the Commissioner of Income
Tax, Gujarat I, the Income Tax Appellate Tribunal has

submitted the statement of case and referred the following question of law arising out of its order in I.T. Appeal No.586 of 1982, relating to assessment year 1977-'78 :-

" Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that Smt. Tilottama Chandravadan Laskari could be a partner in the firm in two capacities and therefore, the commissioner of Income-tax was not justified in passing an order U/s.263 of the Income-tax Act?"

Under a Deed of Partnership dated 3rd March, 1972, Shri Chandravadan Durgaprasad Laskari, Kumari Amita Chandravadan Laskari, Kumari Anuradha Chandravadan Laskari and Smt. Tilottama Chandravadan Laskari were carrying on business of the firm in the name and style of "Messrs. Jabal Industries", which was registered under the Income Tax Act for 1973-'74. Said Shri Chandravadan was Karta of H.U.F. and his income from firm was being assessed as that of H.U.F. On 8.7.1976, said Chandravadan Durgaprasad Laskari died and a fresh partnership deed came into existence between the remaining partners. Smt. Tilottama Chandravadan Laskari, widow of the deceased, described herself as partner in two capacities, one in her individual capacity and another representing the interest of the Hindu Undivided Family as Karta which was earlier represented by her husband since deceased. Assessments of the three partners, viz., Smt. Tilottama Chandravadan Laskari, Kumari Amita Chandravadan Laskari, and Kumari Anuradha Chandravadan Laskari, were completed on 18.12.1979, 29.9.1979 and 21.12.1979. Thereafter, the Firm was granted registration under the Income Tax Act by order dated 7.2.1980 and the assessment of the Firm as a Registered Firm was also made. On 7.3.1980, Chandravadan Durgaprasad Laskari (Deceased) was also assessed as H.U.F., presumably under the provisions of Section 168 of the Income Tax Act.

Thereafter, the Commissioner of Income Tax, purporting to exercise jurisdiction under Section 263 of the Income Tax Act, considering that the order of grant of registration to the Firm was erroneous and it was prejudicial to the interest of the Revenue, issued show cause notice for withdrawing the registration because in his view, Smt. Tilottama Chandravadan Laskari, could not be a partner in the Firm in two capacities, viz.,

individual capacity as well as representing the H.U.F. of Chandravadan Durgaprasad Laskari.

It was brought to the notice of the Commissioner that this Court, the jurisdictional High Court, in C.I.T., Gujarat II v. Budhalal Amulakhdas, 129 ITR 97 had taken a view that in the case of a Member of H.U.F., same person can be a partner in the Firm in dual capacity provided there are other partners. The C.I.T., opining that the Department has not accepted the view of the Gujarat High Court and it has been decided to file a Special Leave Petition before the Supreme Court, decided to take a view contrary to the decision of the Gujarat High Court for the purposes of making an order under Section 263. The alternative contention was also raised before the C.I.T. that partners having already been assessed prior to the assessment of the Firm, either as registered or as unregistered Firm, in as much as, assessment of the partners have taken place even before the registration was granted, it is not possible now to assess the income of the Firm once again as an unregistered firm in view of the decision of this Court in Laxmichand Hirjibhai v. Commissioner of Income Tax, Gujarat III, 128 ITR 747. The Commissioner, for the same reasoning which he applied to the decision in Budhalal's case (supra) that the question of filing a Special Leave Petition to the Supreme Court is under consideration, decided to bypass the decision of this Court and made the order under Section 263, directing the Income Tax Officer to cancel his order of registration. However, from the order, except that the decision of the Gujarat High Court in Laxmichand Hirjibhai's case is pending consideration for filing Special Leave Petition to the Supreme Court, nothing was spelt out as to how the order would be prejudicial to the interest of the Revenue. The Tribunal, on both counts, following the aforesaid decision of the Gujarat High Court, respectively, accepted the contention of the assessee and allowed the appeal, by setting aside the order of the Commissioner under Section 263.

The question referred to us have two-fold dimensions; firstly, it raises a question on merit about the genuineness of a Firm, wherein one individual has entered into partnership in two different capacities by projecting as if there are two persons in two different capacities; and the second limb of the question is whether the Commissioner was not justified in passing an order under Section 263 of the Income Tax Act.

Having carefully considered the rival contentions

and perused the statement of case, along with Annexures, we are of the opinion that the Revenue must fail on a short ground concerning the second part of the question, which would render consideration of the first part to be academic.

Section 263, which empowers the Commissioner to revise any order passed by the Assessing Officer, by ordering enhancement, modification or cancellation of the assessment or directing a fresh assessment in given circumstances, is inhibited by two pre-conditions. The first condition is that the Commissioner considers the order in question to be erroneous and secondly such error, which exists according to Commissioner, must also be considered to be prejudicial to the interest of the Revenue. These two considerations must arise as a result of examining the record of the proceedings and after hearing the affected party. These requirements indicate that existence of condition do not depend upon subjective satisfaction of the Commissioner and that mere existence of an error in the order is not sufficient to direct revision of the order. It must be further shown that such error, if allowed to remain, results in affecting the interest of Revenue prejudicially. Live nexus between the two has to be established.

It is not sufficient for the Commissioner while making an order merely to record that he considers the order to be erroneous and that he considers it to be prejudicial to the interest of the Revenue. His consideration must point out both to the nature of error as well as how such error is to be treated as prejudicial to the interest of Revenue. In other words, the consideration on both the aspects, which permits the Commissioner to revise the order made by the Assessing Officer, must be a speaking one, disclosing the nature of the error and the manner in which it is to be treated as prejudicial to the interest of the Revenue. If either of the conditions fails, the order cannot be sustained. This Court in C.I.T. v. Smt. Minalben S. Parikh, 215 ITR 81, while considering the ambit and scope of words "prejudicial to the interests of the Revenue", occurring in Section 263 of the I.T. Act, held :-

"... it can well be said that the well-settled principle in considering the question whether an order is prejudicial to the interests of the Revenue or not is to address oneself whether the legitimate revenue due to the exchequer has been realised or not or can be realised or not if the

orders under consideration are allowed to stand. For arriving at this conclusion, it becomes necessary and relevant to consider whether the income in respect of which tax is to be realised, has been subjected to tax or not or if it is subjected to tax, whether it has been subjected to tax at the rate at which it could yield the maximum revenue in accordance with law or not. If the income in question has been taxed and legitimate revenue due in respect of that income has been realised, though as a result of an erroneous order having been made in that respect, in our opinion, the Commissioner cannot exercise the powers for revising the order under section 263 of the Act merely on the basis that the order under consideration is erroneous. if the material in that regard is available on the record of the assessee concerned, the Commissioner cannot exercise his powers by ignoring that material which links the income concerned with the tax realisation made thereon. The two questions are interlinked and the authority exercising the powers under section 263 of the Act is under an obligation to consider the entire material about the existence of income and the tax which is realisable in accordance with law and further what tax has in fact been realised under the alleged assessment orders...."

From the facts noted above, we find that so far as the question of realisation of Revenue, considering the Firm to be registered, the same has been realised and there is no error on that ground and no prejudice is caused on that ground. In the case of a firm, which is unregistered, it has been expressly provided under Section 183 that in such a case, it is open to the Income Tax Officer to treat it and make an assessment on it as if it were a registered firm, if such a course was more beneficial to the Revenue in the sense that such a course would fetch more tax to the Public Exchequer. This is how provision of Section 183 was referred to by the Supreme Court in I.T.O. v. Ch. Achaiah, 218 ITR 239.

Considering this aspect of the matter, if as a result of withdrawal of registration, the Firm is to be treated as unregistered, the question of it being prejudicial to the interest of Revenue depends upon consideration of question that the assessment in which of the status would yield more Revenue to the Public

Exchequer. To say in other words, if the tax already recovered from the firm and its partners by assessing them by treating the firm as registered firm, there can be no occasion for modifying or cancelling the assessment already made. When an issue arises for modifying already existing assessments to be in the status of unregistered Firm in exercise of power under Section 263, unless the order of the Commissioner indicates his application of mind to aforesaid aspect of the matter, it cannot be said that he has considered the matter to be prejudicial to the interest of Revenue in accordance with law. Mere reproduction of the language of the statute would not satisfy the condition. As we have noticed that while the Commissioner has given reasons for considering the order of registration to be erroneous, it has not further established any link with the error, which he considers to be there in the order, and the loss of revenue, which it would cause, if it is allowed to exist to show the error would be prejudicial to the interest of Revenue. Therefore, the Tribunal, in our opinion, was justified in holding that exercise of power under Section 263 itself was bad.

In view of our aforesaid conclusion, the further question whether conditions were existing for granting registration or not in the present case will be of academic interest, which need not be considered.

Accordingly, question referred to us is answered in the Affirmative, i.e. against the Revenue and in favour of the Assessee, by holding that the Tribunal was right in coming to the conclusion that the Commissioner of Income Tax was not justified in passing order under Section 263 of the Income Tax Act. Reference accordingly stands disposed of. No order as to costs.

Before parting with the case, we record our appreciation of Mr.D.A. Mehta, who has rendered services as amicus curiae in a case which was unrepresented by the Assessee.

(apj)